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No. 91-334

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ZLATKO GVOZDENOVIC, *et al.*,
Petitioners,

v.

UNITED AIRLINES, INC.,
ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS ASSOCIATION OF FLIGHT ATTENDANTS, SUSAN BIANCHI-SAND, PATRICIA FRIEND, AND THE PRE-ACQUISITION UNITED AIRLINES FLIGHT ATTENDANTS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below properly concluded that plaintiffs' claim that the Association of Flight Attendants ("AFA") breached its duty of fair representation by entering into a collective bargaining agreement which provided that an arbitrator would determine plaintiffs' competitive flight attendant seniority at United Airlines, Inc. ("United") was time-barred (in addition to being meritless) where the suit was not filed until nearly two years after the agreement was signed?

2. Whether the court below correctly declined to vacate an arbitration award determining plaintiffs' competitive seniority rights at United when United and AFA were authorized to submit the seniority issue to arbitration and plaintiffs fully participated, without protest, in the extensive and fair arbitration proceedings?

3. Whether the court below properly concluded that plaintiffs' claims that they were subjected to an unlawful "closed shop" and that United unlawfully provided financial assistance to AFA were time-barred where suit was not filed until nearly two years after the alleged wrongs occurred?

LIST OF PARTIES TO THE PROCEEDINGS

United Airlines, Inc., Stephen Wolf,* Association of Flight Attendants, AFL-CIO, Susan Bianchi-Sand, Patricia Friend, and the Pre-Acquisition United Airlines Flight Attendants were defendants in the district court, appellees in the court of appeals, and are respondents in this Court.

Zlatko Gvozdenovic, Margarita Walinski, Patricia Cargould, Frank Perea, individually and on behalf of the class of 1202 former Pan American Flight Attendants now employed by United Airlines, Inc., were plaintiffs in the district court, appellants in the court of appeals, and are petitioners in this Court.

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* Stephen Wolf, not listed as a party in the Petition, was a defendant below and thus is a party to these proceedings. Supreme Court Rule 12.4.

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STATEMENT OF THE CASE

A. In April 1985, United Airlines, Inc. ("United") agreed to purchase the Pacific Division of Pan American World Airways, Inc. ("Pan Am"). App., A.3.[1] As part of the transaction, United agreed to hire 1,202 Pan Am flight attendants (the "1202" or "plaintiffs"). *Id.*

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[1] "App. ——" refers to the appendix annexed to the petition for a writ of certiorari. "Pet. ——" refers to the petition. "J.A. ——" refers to documents in the joint appendix submitted to the court of appeals.

Before any Pan Am flight attendants accepted United job offers, they were informed that, pursuant to a collective bargaining agreement reached between United and the Association of Flight Attendants ("AFA"), the bargaining representative for the United flight attendants, the competitive seniority which the 1202 would have at United would be determined in an arbitration between the 1202 and the incumbent United flight attendants. App., A.4, C.3. The agreement also provided, *inter alia*, that the 1202 would be: credited with their entire service at Pan Am for determining their pay level at United; guaranteed positions at United's west coast international domiciles, even if more senior United flight attendants desired those positions; and relieved from serving the probationary period required of newly employed flight attendants and, as a consequence, be afforded the immediate, full protections of the United-AFA collective bargaining agreement. J.A. 164-66, 276, 632-36, 949, 976-78, 1105-10, 1134, 1342, 1374-75; *see* App., A.12.[2] All Pan Am flight attendants were guaranteed continued employment with Pan Am; none was compelled to join United. App., A.4, C.3.

The 1202 commenced United employment on February 11, 1986. App., A.4. Thereafter, the promised arbitration took place; the 1202 fully participated, without objection, through their chosen committee[3] and counsel, as did the incumbent United flight attendants. App., A.4-5, A.7, C.8. In September 1987, the arbitrator, who had been jointly selected by the two committees, issued a final award (the "Award") integrating the 1202 into the

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[2] The United-AFA Agreement was reached in December, 1985, App., A.4, ratified in January 1986, App., B.3, and formally signed on March 14, 1986. J.A. 636, 960-61.

[3] Contrary to the caption and the list of parties in the Petition, Pet., p. (i), the four named plaintiffs were not members of the Committee which represented the 1202 in the arbitration. *E.g.*, J.A. 197-200.

United seniority list in a manner which the arbitrator considered to be most "equitable." App., A.5; J.A. 274. The basis for the Award was "carefully and thoroughly described" in the arbitrator's lengthy opinion. App., C.5.

B. On December 28, 1987, four of the former Pan Am flight attendants filed suit on behalf of the 1202 against United, AFA and certain officials of each organization. App., A.5. Plaintiffs claimed, *inter alia*, that the Award should be vacated because the 1202 were not parties to the underlying agreement which provided for the arbitration, and that the Award was procured in violation of AFA's duty of fair representation ("DFR"). App., A.5-6. Plaintiffs subsequently asserted that an alleged requirement that the 1202 become AFA members immediately upon employment with United and the denial of plaintiffs' alleged right to full credit for their seniority at Pan Am violated § 2 Eleventh(a) of the Railway Labor Act ("RLA"), 45 U.S.C. § 152 Eleventh(a). App., A.5, 10; J.A. 458-69. Without further amending their complaint, plaintiffs additionally, through briefs, alleged that AFA received improper financial assistance from United in violation of § 2 Fourth of the RLA, 45 U.S.C. § 152 Fourth, and that AFA improperly raised the dues of the 1202 in violation of § 101(a)(3) of the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411(a)(3). App., A.5-6, 12.

At the conclusion of a bench trial, App. A.6, B.1 (not as plaintiffs assert, on hearing of summary judgment motions, Pet. p. 2), the district court rejected all of plaintiffs' claims related to the issues tried, App., C.1-13, finding, *inter alia*, that plaintiffs, having "consented to" and "active[ly]" participated in the arbitration, were bound by the resulting Award, App., C.8, that the United-AFA Agreement establishing the arbitration treated the two flight attendant groups "with perfect parity," App., C.12, that there "was no failure of any duty of fair representation," *id.*, and that plaintiffs' principal claims were en-

tirely baseless and "a shocking example of wasteful litigation." App., C.13. The trial court subsequently ruled that the RLA and LMRDA statutory claims were time-barred. App., B.4-6.

C. The Second Circuit affirmed the district court rulings in their entirety. Among other things, the appellate court concluded that plaintiffs were bound by the Award because they actively and voluntarily participated in the arbitration without objection and thus by their "conduct manifested a clear intent to arbitrate the dispute," and also because, under established labor law principles, they were bound by the terms of the collectively bargained arbitration agreement upon their becoming part of the United flight attendant collective bargaining unit. App., A.7-8. The court further concluded that AFA did not breach its DFR by agreeing with United to leave the determination of plaintiffs' competitive seniority at United to an arbitrator, and that, in any event, the DFR claim was time-barred because it was not filed within six months after the signing of the challenged arbitration agreement. App., A.8-9. The court of appeals also affirmed the trial court's ruling that plaintiffs' RLA claims were time-barred. App., A.10-11. While the Second Circuit did not find the LMRDA claim untimely, it nevertheless affirmed its dismissal on the merits not only because plaintiffs had failed to demonstrate that AFA illegally increased the dues of the 1202, App., A.12, but also because the 1202 were granted significant "unique employment benefits" which distinguished them from "newly employed flight attendants," App., A.12; *supra*, p. 2, and thus the imposition of dues immediately upon commencement of the employment of the 1202 at United was appropriate under the terms of the United-AFA agreement, upon which plaintiffs' claim was based. App., A.12.

SUMMARY OF ARGUMENT

The decision below involves the routine application of fundamental labor law tenets to undisputed facts, *see* Pet., p.4 (plaintiffs adopt court of appeals' statement of the facts), and is consistent with decisions of this and other appellate courts. The Petition presents no issues warranting Supreme Court review.

REASONS WHY THE WRIT SHOULD BE DENIED

THE DECISION BELOW IS CONSISTENT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS AND DOES NOT MERIT SUPREME COURT REVIEW

A. The Petition, on its face, demonstrates that review of the determination below that the DFR claim was time-barred would be purposeless. The Second Circuit rejected the DFR claim not only on limitations grounds but also on the merits. App., A.10; *see* App., C.2-12 (district court also rejected DFR claim on merits).[4] The Petition does *not* seek review of the dismissal on the merits; accordingly, the dismissal of the DFR claim will be unaffected by any further disposition of the limitations issue.

In any event, the limitations ruling was correct. Plaintiffs claimed that AFA breached its DFR by entering into an agreement with United which left the resolution

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[4] The appellate court correctly applied this Court's most recent articulation of the DFR standard, *Air Line Pilots Ass'n, Int'l* v. *O'Neill*, 111 S.Ct. 1127, 1136 (1991), in determining that AFA did not breach any representational duty by entering into an agreement which left the seniority matter to resolution by arbitration between the two affected employee groups. App., A.9-10. *Accord Air Wisconsin Pilots Protection Comm.* v. *Sanderson*, 909 F.2d 213, 216 (7th Cir. 1990) (where plaintiffs are provided "a *fair* [arbitration] *process* for determining [their] seniority . . . nothing more is required to comply with the duty of fair representation") (emphasis in original), *cert. denied*, 111 S.Ct. 958 (1991).

of the competitive seniority issue to arbitration and which purportedly provided for an arbitration process which favored the incumbent United flight attendants. J.A. 458-69; App., C.7. The lower court, in accordance with established precedent, held that a DFR claim is subject to a six-month statute of limitations, *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151, 169-71 (1983), and when, as here, it is predicated on an allegedly improper agreement, it accrues when the agreement is reached. App., A.9.[5] Because plaintiffs did not sue until nearly two years after execution of the challenged agreement, the DFR claim was time-barred. Plaintiffs' contention that the limitations period should have been "tolled" while they awaited the arbitrator's ruling, Pet. pp. 11-12, even though their claim was that the arbitration proceeding was defective *ab initio*, would permit plaintiffs to improperly "pin the . . . arbitration proceeding onto their [DFR] case in order to extend the applicable limitations period," *Arriaga-Zayas* v. *ILGWU*, 835 F.2d 11, 15 (1st Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988), and runs directly counter to the need for "rapid final resolution of labor disputes favored by federal law." *DelCostello*, 462 U.S. at 168.[6] None of the

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[5] *Local Lodge 1424, I.A.M.* v. *NLRB*, 362 U.S. 411, 415-19 (1960); *United Indep. Flight Officers, Inc.* v. *United Air Lines, Inc.*, 756 F.2d 1262, 1273 (7th Cir. 1985); *Engelhardt* v. *Consolidated Rail Corp.*, 594 F. Supp. 1157, 1172 (N.D.N.Y. 1984), *aff'd*, 756 F.2d 1368 (2d Cir. 1985).

[6] *See also Adkins* v. *International Union of Elec. Workers*, 769 F.2d 330, 335 (6th Cir. 1985) (no tolling of DFR six-month limitation during pendency of National Labor Relations Board proceeding addressing same conduct challenged in DFR action); *Boyd* v. *Teamsters Local Union 553*, 589 F. Supp. 794, 796 (S.D.N.Y. 1984) (same); *cf. Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 236 (1976) (no tolling of Title VII statute of limitations while plaintiff pursues relief through grievance proceedings for same alleged wrongdoing); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 460-66 (1975) (time for filing claim under 28 U.S.C. § 1981 not tolled by pursuit of administrative remedy directed at same conduct).

cases on which plaintiffs rely (Pet., pp. 11-12) supports "tolling" the statute of limitations here.[7]

B. Plaintiffs' contention that they are not bound by the Award or the underlying arbitration agreement because they were not employees of United when the agreement was reached, Pet., pp. 12-13, is at odds with basic principles of federal labor law. As the Second Circuit correctly held, App., A.7, a collective bargaining agreement, including one providing for arbitration, applies not only to employees in the bargaining unit when the agreement is reached, but also to those who join the bargaining unit during the agreement's duration; an employer and union need not renegotiate or reaffirm their agreement each time a new employee is hired in order to bind the individual to the agreement's terms.[8] *Sanders* v. *Air Line Pilots Ass'n, Int'l*, 361 F.Supp. 670, 672-73 (S.D.N.Y. 1973), Pet., pp. 12-13, merely confirms the uncontestable tenet that employees of the surviving company in a merger (in our case, the incumbent United flight at-

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[7] *West* v. *Conrail*, 481 U.S. 35, 36 (1987), confirms that a DFR action begins to run when plaintiffs learn of the union's alleged breach. *Robinson* v. *Pan Am World Airways, Inc.*, 777 F.2d 84, 89 (2d Cir. 1985), discusses the applicability of equitable tolling in a situation, indisputably absent here, where defendants have actively misled plaintiffs as to the facts giving rise to their cause of action. No arbitration proceeding or award was involved in *Hogan* v. *Brotherhood of Ry. Clerks*, 817 F.2d 248, 250 (4th Cir. 1987), and nothing in *DelCostello*, 462 U.S. at 172, holds that the limitation period of a DFR claim that is founded, as here, on the terms of a collective bargaining agreement, is tolled until issuance of an arbitration award.

[8] *J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 335-36 (1944); *NLRB* v. *Laney & Duke Storage Warehouse Co.*, 369 F.2d 859, 866 (5th Cir. 1966); *Wood* v. *National Basketball Ass'n*, 602 F. Supp. 525, 529 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2d Cir. 1987); *Powell* v. *National Football League*, 711 F. Supp. 959, 962-63 (D. Minn. 1989); *Zimmerman* v. *National Football League*, 632 F. Supp. 398, 405 (D.D.C. 1986); R. Gorman, Labor Law 377 (1976). Different principles apply when dealing with commercial arbitrations, App.,

A.7, as in the cases cited at Pet., p. 12.

tendants) are not bound by the collective bargaining agreement between the acquired company and its employees' union (here, the agreement between Pan Am and the bargaining representative of the Pan Am flight attendants). Further, both *Sanders*, 361 F.Supp. at 673, 677, and *Cook* v. *Pan Am World Airways, Inc.*, 771 F.2d 635, 645-46 (2d Cir. 1985), *cert. denied*, 474 U.S. 1109 (1986), Pet., p. 13, reflecting established law, including the ruling below, App., A.7, hold that, where, as here, plaintiffs' interests have been represented in an arbitration proceeding, they are bound by the ensuing award.[9]

C. Plaintiffs' request for review of the dismissal of their RLA Section 2 Eleventh(a) claim rests on a misconstruction of the ruling below and a misreading of the applicable law.

First, contra Pet., pp. 5-6, the Second Circuit only determined that the RLA claim was time-barred, App. A.10-11; it did not purport to address the scope of the statutory provision.

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[9] *E.g., Teamsters Local 764* v. *J.H. Merritt & Co.*, 770 F.2d 40, 42 (3d Cir. 1985); *Jones Dairy Farm* v. *Local P-1236, UFCW*, 760 F.2d 173, 175 (7th Cir.), *cert. denied*, 474 U.S. 845 (1985); *International Bhd. of Teamsters, Local 117* v. *Washington Employees, Inc.*, 557 F.2d 1345, 1350 (9th Cir. 1977).

Beardsley v. *Chicago & N.W. Transp. Co.*, 850 F.2d 1255 (8th Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989), and *Jones* v. *Trans World Airlines, Inc.*, 495 F.2d 790, 797-98 (2d Cir. 1974), Pet., pp. 13-14, sharply contrast with the situation here in which the United-AFA Agreement left the seniority issues to determination through an arbitration in which plaintiffs were full and equal participants. In *Beardsley*, the agreement (to which the arbitrator improperly deferred) determined plaintiffs' *substantive* seniority rights (placing them at the bottom of the seniority list), and was negotiated by local union officers in violation of both the requirements imposed by the governing collective bargaining agreement negotiated by the local's parent international union and the international's construction of its constitution. 850 F.2d at 1259, 1261-63, 1268-71. In *Jones*, the union negotiated an agreement which placed a group of employees who were already in the bargaining unit at the bottom of the seniority list solely because they were not union members. 495 F.2d at 797-98.

Second, the appellate court's rejection of plaintiffs' "continuing" violation theory, App., A.11, is in accord with decisions of this Court and other appellate courts. Because the alleged improper requirement that plaintiffs join AFA upon employment at United was embodied in the United-AFA agreement, *see* Pet., p. 11 (plaintiffs' compulsory union membership claim "inextricably bound up" with agreement), it accrued at the latest when the agreement was signed (March 14, 1986), and is time-barred. App., A.11; *Local Lodge 1424*, 362 U.S. at 423; *Hogan*, 817 F.2d at 250 (six-month limitation applicable to RLA § 2 Eleventh claim); *supra*, p. 6 & n.5. Further, even assuming *arguendo* that plaintiffs were entitled to a 60 day "grace period" under Section 2 Eleventh before AFA membership could be required, membership indisputedly could have been required, and thus any alleged violation would have ceased, 60 days after the employment of the 1202 commenced, *i.e.*, by April 12, 1986. *Hogan*, 817 F.2d at 250 (claim of improper compulsion to join union accrues when alleged unlawful coercion ends). The refusal of the lower court to permit plaintiffs to sidestep the limitations bar by characterizing their claim as "continuing," App. A.11, or by relying on alleged timely claims of a handful of subsequently hired former Pan Am flight attendants who were not class members, *see* App., B.5, conforms with decisions of this Court and the lower courts in the Title VII context,[10] as

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[10] *Lorance* v. *AT&T*, 490 U.S. 900, 906-08 (1989) (limitation period commenced when alleged discrimination occurred); *Delaware State College* v. *Ricks*, 449 U.S. 250, 257-59 (1980) (same); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558-60 (1977) (same). *See Movement For Opportunity and Equality* v. *General Motors Corp.*, 622 F.2d 1235, 1248 (7th Cir. 1980) (timely claims of certain class members cannot revive time-barred claims of others); *Wetzel* v. *Liberty Mutual Ins. Co.*, 508 F.2d 239, 246 (3d Cir.) (same), *cert. denied*, 421 U.S. 1011 (1975); *Selzer* v. *Board of Ed.*, 113 F.R.D. 165, 168 (S.D.N.Y. 1986) (same); *Carter* v. *Newsday, Inc.*, 76 F.R.D. 9, 15 (E.D.N.Y. 1976) (same); *Hecht* v. *Cooperative for Am. Relief Everywhere, Inc.*, 351 F. Supp. 305, 310 (S.D.N.Y. 1972) (same).

well as other lower court labor law decisions.[11] The authorities cited by plaintiffs, Pet. pp. 9-10, are either consistent with the ruling below, *NLRB* v. *Campbell Soup Co.*, 378 F.2d 259 (9th Cir.), *cert. denied*, 389 U.S. 900 (1967),[12] or inapposite.[13]

D. Plaintiffs also provide no basis for review of the Second Circuit's refusal to treat plaintiffs' claim under § 2 Fourth of the RLA, 45 U.S.C. § 152 Fourth, as "con-

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[11] *United Indep. Flight Officers*, 756 F.2d at 1273 & n.14 (rejecting assertion of continuing violation and determining that claim accrued when alleged wrong occurred); *Engelhardt*, 594 F. Supp. at 1171-72 (same); *Bedat* v. *McLean Trucking Co.*, 119 L.R.R.M. (BNA) 2945, 2946-47 (D. Conn.) (same), *aff'd without opinion*, 794 F.2d 676 (2d Cir. 1984); *Adkins* v. *General Motors Corp.*, 573 F. Supp. 1188, 1193 (S.D. Oh. 1983) (same), *aff'd*, 769 F.2d 330 (6th Cir. 1985).

[12] In *Campbell*, the reimbursement of one month's dues for violation of a 30 day "grace period" provided under the National Labor Relations Act was available only to those "employees hired within six months prior to the time the charge was filed . . . ." 378 F.2d at 260-61.

[13] *Felter* v. *Southern Pac. Co.*, 359 U.S. 326, 331 (1959), provided simply that an individual cannot be subjected to a union dues checkoff (of which, *contra*, Pet., p. 10, there is none at issue in the instant case) until the employee executes a checkoff assignment, and, *contra*, Pet., p. 10, makes no mention of a "six month" period or its "tolling" or "waiver." Neither does *Communication Workers* v. *Beck*, 487 U.S. 735 (1988), which, like *Ellis* v. *Western Airlines*, 652 F. Supp. 938 (S.D. Cal. 1986), concerned issues related to the chargeability of union expenditures to objecting non-members which have nothing to do with this case. *NLRB* v. *Sightseeing Guides Union Local 20076*, 310 F.2d 40, 41 (2d Cir. 1962), and *NLRB* v. *Gottfried Baking Co.*, 210 F.2d 772, 780 (2d Cir. 1954), involved illegal closed-shop agreements which, unlike here, continued to favor the hiring of union members over non-union members within six months of the filing of NLRB charges. Further, even where a closed-shop agreement exists, no dues reimbursement is required where, as here, there is no evidence that union membership was compelled. *Local 60, United Bhd. of Carpenters* v. *NLRB*, 365 U.S. 651, 654 (1961). *See* App., B. 3 (15% of plaintiffs' class elected not to become AFA members).

tinuing" beyond the limitations period. The § 2 Fourth claim was based on United's provision of equal funding to the committees representing the two flight attendant groups for activities related to the arbitration. App., A. 4; *see also* J.A. 639, 1480-81 (funding not provided to AFA).[14] Because all payments were made in March 1986, *id.*, plaintiffs' failure to sue within six months thereafter was fatal, as the court below properly held. App., A. 10-11. *Accord Robinson*, 777 F.2d at 87-89 (six-month limitation applicable to RLA § 2 Fourth claim); *see* cases cited *supra*, pp. 9-10 & nn.10, 11 (claim does not continue once alleged violation ended).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[14] The funding arrangements which AFA secured benefitted plaintiffs by eliminating the significant financial advantage which the incumbent United flight attendants, who outnumbered the 1202 by 9 to 1, would have enjoyed had the two groups been required to underwrite their own arbitration-related legal fees and costs through an assessment of their respective flight attendant constituents. J.A. 491 ¶ H, 639, 1480-82.